Case No. 56547-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DR. GILLIAN MARSHALL,

Appellant,

v.

THE STATE OF WASHINGTON, UNIVERSITY OF WASHINGTON, DIANE YOUNG, JILL PURDY, AND MARK PAGANO,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Dr. Marshall's brief is long on rhetoric and short on actual evidence of discrimination or retaliation—because none exists. Serious problems with Dr. Marshall's teaching emerged in her second year, and continued with every graduate-level course she taught. Narrative comments from students emphasized her lack of preparation, poor time management, and disorganization. One student described a graduate course taught by Dr. Marshall as "a complete waste of time, money, and effort." Dr. Marshall was repeatedly told her teaching needed to improve, but it did not.

By the time she applied for tenure, Dr. Marshall's graduate teaching scores were among the lowest in her program. The University's promotion and tenure process involves multiple layers of review by faculty and administrators, and 18 of 20 University reviewers concluded Dr. Marshall had not met the University's standard of demonstrating substantial success in teaching. Her teaching record, rather than any discrimination or retaliation, drove the employment decisions at issue.

Lacking evidence that race or retaliation motivated any tangible employment action, Dr. Marshall also complains about a variety of workplace issues dating back to 2015 to claim she experienced a hostile work environment. But again, she cannot show any of these incidents—ranging from which classes she was asked to teach, to whether a colleague on sabbatical could sit on a review committee—related to her race, let alone establish a severe or pervasive environment based on racial harassment. The law does not ascribe racial motivation to every instance where an employee disagrees with an employer or colleague of a different race. Dr. Marshall also attempts to rely on generalized arguments about the history of racism in education and opinions about others' experiences on campus, but even if any of this were admissible, none of it shows Dr. Marshall experienced any unlawful treatment based on her race.

Dr. Marshall cannot show her race negatively affected any employment decision about her, and her remaining complaints about an alleged hostile work environment or whistleblowing

activities also do not give rise to actionable claims. This Court should affirm summary judgment dismissal.

II. STATEMENT OF ISSUES

1. Should the Court affirm summary judgment for Defendants because Dr. Marshall cannot demonstrate discrimination or retaliation due to her race or protected whistleblowing activity?

2. Should the Court decline to address issues that Dr. Marshall failed to brief?

III. STATEMENT OF THE CASE

A. The University enthusiastically recruited Dr. Marshall as an assistant professor in 2015.

In 2014, University of Washington Tacoma ("UWT")'s Social Work and Criminal Justice program[1] ("SWCJ") initiated a search to hire a new assistant professor, which is a multi-year, tenure-track position. CP 3167, 3176, 3174. The SWCJ program offers three degrees, with the majority of students participating in masters-level programs. CP 3176. During the 2014

[1] This academic unit changed from a program to the School of Social Work and Criminal Justice during Dr. Marshall's employment.

recruitment process, the SWCJ program was actively looking to increase diversity. CP 3168, 3176.

Dr. Gillian Marshall applied for the SWCJ position. CP 3599. In her cover letter, Dr. Marshall acknowledged "teaching and research are equally vital," and stated she is "committed to both in order to be an effective educator." *Id.* Dr. Diane Young, who served as the program's director until July 2019 (except for her sabbatical in 2016-17), recognized Dr. Marshall was "a highly qualified applicant," and believed her research and teaching interests would be consistent with the program's needs. CP 3167-68.

When she applied to UWT, Dr. Marshall was expecting the National Institutes of Health to award her a K01 grant. CP 3168, 2736. The K01 grant is a "career development award" intended to allow faculty members to "focus on augmenting [their] research agenda" for five years. CP 2737. Faculty receiving this grant are expected to devote 75 percent of their

time to grant-related activities, leaving only 25 percent for teaching and service. CP 2765, 3508.

After considering dozens of applicants, a search committee chaired by Professor Erin Casey invited Dr. Marshall and four other candidates for a campus visit. CP 3174. Dr. Young personally interviewed Dr. Marshall. CP 3168. Although the program was initially looking to fill one position, Dr. Young lobbied for the opportunity to make an additional offer after meeting the candidates and noting that four of the top five were strong candidates who could bring diverse perspectives. CP 3168, 3179. All four of those candidates were people of color. *Id.* Her efforts were successful, and the program increased the positions available to make offers to two women of color, including Dr. Marshall. CP 3168-69, 3178-79.

After receiving the University's offer, Dr. Marshall negotiated for a higher salary. CP 3169, 2736. Dr. Young was eager to hire Dr. Marshall, and agreed to increase her starting

salary. CP 3169. Dr. Marshall began working as an assistant professor in 2015. CP 2870.

B. The University follows robust procedures for evaluating faculty members.

The University follows robust procedures for evaluating and rewarding faculty performance through annual reviews, raises, and promotions. These procedures are rooted in the University's Faculty Code, which has been jointly developed and agreed to by faculty and administrative leaders at the University following a shared governance process. CP 3101-34. The Faculty Code also includes criteria for evaluating three essential aspects of faculty performance: scholarship and research, teaching, and service. CP 3102-04.

1. Annual merit reviews and reappointment

Each year, faculty performance is reviewed through a multi-layer review process to evaluate merit. CP 3126. A meritorious performance review may result in a raise. CP 3169. If a faculty member receives two consecutive annual ratings of

non-meritorious, the Faculty Code requires additional procedures to evaluate those decisions. CP 3127.

The Faculty Code also governs a process known as "reappointment." Assistant professor positions typically last three years with the potential for reappointment to another three-year term. CP 3112. The Faculty Code describes the process for reappointment review, which typically occurs during an assistant professor's second year (although it may be postponed). CP 3169-70, 2861, 3122. If an assistant professor is reappointed, their second term "must include a tenure decision." CP 3112.

2. Promotion and tenure

An assistant professor has a mandatory review for tenure and promotion to associate professor in their second three-year term. CP 3112, 3137.[2] Applications for promotion and tenure must meet very high standards and are subject to rigorous review.

[2] For efficiency, references in this brief to "tenure" review include the concurrent review process for both promotion and tenure.

Tenure is an honor to be earned, not a right. It is akin to a lifetime appointment. After candidates earn tenure, they may be removed under only very limited circumstances, such as a felony conviction or scholarly misconduct. CP 3140. According to the Faculty Code:

> Tenure should be granted to faculty members of such scholarly and professional character and qualifications that the University, so far as its resources permit, can justifiably undertake to employ them for the rest of their academic careers. Such a policy requires that the granting of tenure be considered carefully. It should be a specific act, even more significant than promotion in academic rank, which is exercised only after careful consideration of the candidate's scholarly and professional character and qualifications.

CP 3139.

In keeping with these principles, the University sets high standards for granting tenure and promotion:

> Appointment to the rank of associate professor requires a record of substantial success in teaching and/or research. For . . . tenure-eligible . . . appointments, *both of these shall be required*, except that in *unusual* cases an outstanding record in one of these activities *may* be considered sufficient.

CP 3105 (emphasis added); *see also* CP 2712 (citing previous version).

In addition, the University follows robust procedures to review applications for tenure, commensurate with "the significant long-term commitment the University is considering." CP 2862. The Faculty Code establishes multiple layers of review, including extensive input from faculty and administrators. CP 3123-25, 3139, 2862-63. The Provost then makes the final decision. CP 3139.

C. Dr. Marshall received annual evaluations following multiple layers of reviews.

1. After her first year, Dr. Marshall received strong course evaluations, was deemed meritorious, and received a raise.

Dr. Marshall began her three-year term as an assistant professor in the 2015-16 academic year. CP 2894. As anticipated, she was awarded the K01 grant. CP 2738. Because that grant required 75 percent of Dr. Marshall's time to be devoted to grant activities, she had limited time for teaching. CP 3055, 3508. While the typical teaching load for SWCJ faculty was six courses

per academic year, Dr. Marshall taught only one per year. CP 3169. The single class she taught in her first year, a 100-level course, received positive evaluations. CP 2788, 3009-13.

Dr. Marshall's strong teaching evaluations contributed to a positive overall annual review. CP 3055-56. She was deemed meritorious and received a raise. CP 2758, 3057. While this first set of teaching evaluations was positive, Dr. Young stated in Dr. Marshall's review that she recognized Dr. Marshall "will understandably have taught far fewer courses by the time of promotion and tenure than other faculty members typically do," and encouraged her to seek out opportunities to show success teaching both undergraduate and graduate audiences to "strengthen the teaching portion of your promotion and tenure application." CP 3055.

2. Teaching problems emerged in Dr. Marshall's second year, and a decision on her reappointment was postponed.

Dr. Marshall's teaching success did not continue into her second year as she transitioned to teaching graduate-level

students. On a 6-point scale (ranging from "Very Poor (0)" to "Excellent (5)"), Dr. Marshall's combined median course rating from student evaluations for her 2016-17 teaching scored at just 2.8. CP 3014-19. More than half of the evaluations rated her "evaluative and grading techniques" and the "clarity of student responsibilities and requirements" as either "poor" or "very poor." CP 3015.

In addition to low numerical ratings, the evaluations included narrative comments that elaborated on students' negative experiences. For instance, comments highlighted issues with Dr. Marshall's disorganization and lack of preparation; they described inconsistent, "unclear," "confusing," and "changing" expectations for assignments; and more. CP 3016-19.

During Dr. Marshall's second year, the University initiated its second-year reappointment review process. Dr. Young was on sabbatical and did not participate. CP 3169-70.

At the first layer of reappointment review, Dr. Marshall's three-person reappointment committee (which was chaired by Black tenured professor Dr. Marian Harris) provided a written report that noted her strong research performance, but also expressed concerns about her graduate-level teaching. CP 3168, 2788-89, 2794-96. These faculty members concluded her 2.8 rating was "extremely low," and lower than others who teach social work graduate students. CP 2795. The committee noted a single peer evaluation of Dr. Marshall's teaching was "quite favorable," but believed she still needed to "improve her teaching at the graduate level." CP 2795, 2796.

Despite these concerns, the three-person faculty committee recommended reappointment during its initial level of review, noting their expectation that Dr. Marshall would "improve her teaching at the graduate level." CP 2796. Next, the voting faculty of Dr. Marshall's program considered her materials. In a divided vote, the program faculty did not recommend reappointment. CP 3037 (one voted to renew, two

voted to postpone, and three voted not to renew). The voting faculty acknowledged Dr. Marshall's research was strong, but noted "significant concerns with Dr. Marshall's teaching performance to date, particularly at the graduate level." *Id.*

The University decided to postpone its decision on Dr. Marshall's reappointment for one year to give her additional time to demonstrate effective teaching and improve her service. CP 3170, 3037-39. This postponement did not change Dr. Marshall's title, compensation, job duties, or timeline for applying for tenure. CP 2861. That same year, Dr. Marshall's performance was not deemed meritorious due to poor teaching. CP 2758, 3060.

3. Following "extraordinarily low" teaching evaluations in Dr. Marshall's third year, the University followed additional procedures to review her non-meritorious determinations and offered support.

Unfortunately, Dr. Marshall's teaching evaluations did not improve in her third year (2017-18). In fact, they continued to plummet. The one course she taught this year, again at the

graduate level and a required course in the program, received a median rating of 1.3 out of 5. CP 3020-25. A faculty committee recognized this as an "extraordinarily low score for SW&CJ faculty." CP 3050-51. Of 72 social work classes offered in a similar timeframe, only 3 courses received a median rating of 3 or lower for the question asking students about the course as a whole. CP 4588. "Dr. Marshall received a 1.33; the other two low scores were 2.21 and 2.83," and "[t]he person who received a 2.21 is no longer a University employee." *Id.*

Seventy-three percent of the evaluations noted the "clarity of student responsibilities" was "very poor," and more than 70 percent of the evaluations rated use of class time and course organization as "poor" or "very poor." CP 3021. Narrative comments emphasized lack of preparation, poor time management, and disorganization. *Id.* One evaluation acknowledged that Dr. Marshall "is overall a nice person and she does have a lot of knowledge in the social work field," but described problems with her teaching and concluded: "My

experience with Dr. Marshall and this course felt like a complete waste of time, money, and effort. I honestly don't know what suggestions can be made for improving this class. I'm just glad it's over." CP 3023.

Dr. Marshall acknowledged she did not consider a 1.3 rating to be meritorious, and her performance was rated not meritorious that year. CP 2763-64, 2758, 3061.

Following Dr. Marshall's second consecutive non-meritorious review, the University followed its Faculty Code process by appointing an ad hoc faculty committee to review her non-meritorious ratings. CP 3171, 3062, 3127. The committee was chaired by Dr. Casey, who also chaired the search committee that previously recommended hiring Dr. Marshall, and included other program faculty. CP 3171, 3207. The committee met multiple times to consider materials relating to Dr. Marshall's merit evaluations and gather her input. CP 3171, 3207. The committee's December 2018 written report unanimously concluded Dr. Marshall's non-meritorious ratings were

appropriate, and once again noted concerns regarding her teaching. CP 3207-3212.

Meanwhile, Dr. Marshall's reappointment review (postponed from the previous year) proceeded in spring 2018. In a split vote, the faculty on the reappointment committee narrowly supported reappointment. CP 3052-53. Still, their report recognized she was "currently not on track for a positive tenure vote," and concluded it was unlikely she could be successfully promoted on this "teaching-intensive campus" unless "significant improvement in her teaching occurs." CP 3052.

Next, senior voting faculty in the program "noted significant concerns with Dr. Marshall's teaching," and determined even "great research" cannot outweigh "extremely poor teaching." CP 3044. They "provided examples of significant supports offered that she has not utilized," then voted 5-2 against renewal. *Id.*

Program director Dr. Young also considered Dr. Marshall's reappointment. She praised Dr. Marshall for her

research, but noted consistent, serious concerns with Dr. Marshall's teaching. Dr. Young did not recommend reappointment. CP 3043-46. Despite these concerns, the Executive Vice Chancellor for Academic Affairs, Jill Purdy, recommended reappointment, and Chancellor Pagano agreed. CP 3047, 2861, 3147.

Dr. Marshall was then reappointed to a second three-year term as a tenure-track assistant professor, CP 3047, but not without reservation. Even in recommending reappointment, Dr. Purdy highlighted concerns with Dr. Marshall's past performance and future prospects, including serious issues with her teaching. CP 2861, 3047-48. Dr. Purdy noted Dr. Marshall's review committee had concluded her teaching was not on track for promotion and tenure, and emphasized she would have "very limited opportunities to demonstrate strong teaching capability prior to promotion and tenure review." CP 2861-62, 3047-48. Dr. Purdy encouraged Dr. Marshall to address these concerns. CP 2861-62, 3049. Based on a recommendation from the faculty

review committee, CP 3052, Dr. Purdy offered support by proposing to provide a paid teaching mentor, and Dr. Marshall selected Dr. Carolyn West, a tenured Black female professor at UWT. CP 2862, 34.

4. Dr. Marshall was deemed meritorious in her fourth and fifth years following mixed reviews, but she taught very few courses.

Despite the University's efforts to support Dr. Marshall's teaching improvement, she again received very poor student evaluations after her reappointment. She taught the same graduate-level class in Winter 2019 as the previous two years, and this time received a mean score of 1.9 out of 5. CP 3026. Again, she received very low scores on course organization, evaluative/grading techniques, and clarity of student responsibilities, with more than 75 percent of evaluations rating these categories as "very poor" or "poor." CP 3027. When asked which portions of the class contributed most to students' learning, one student commented "nothing," while others

emphasized guest speakers.[3] CP 3028-29. Multiple narrative comments elaborated on challenges with course organization. *Id.* One of the graduate students stated, "This was the most chaotic and stressful class I have ever experienced," and commented that it could have been less stressful if the professor had been "more involved" in the students' work. CP 3028. Another comment similarly states, "I have never taken a worse class in my life." CP 3028. None of the student evaluations referred to Dr. Marshall's race.

The following fall—Dr. Marshall's fifth year at the University—she taught undergraduate students and received higher teaching scores. CP 3031-32.

Although recommendations were once again mixed, Dr. Marshall was deemed meritorious in 2018-19 and 2019-20.

[3] One of the comments Dr. Marshall quotes (Opening Br. 33, 65) makes this point, with a potential typo noted in brackets as follows (and other typos as in the original). When asked about suggestions "for improving the class," one student responded, "I dont think you can shed [she's] all over the place," then remarked, "her speakers were better then her class." CP 3029.

CP 2759, 3075, 3078. However, concerns about teaching were again noted by colleagues and the program director. CP 3074, 3070-71.

5. Dr. Marshall did not earn tenure.

In June 2020, following Dr. Marshall's fifth year, she applied for tenure and promotion to the rank of associate professor. CP 2936. Consistent with the Faculty Code's procedures, Dr. Marshall prepared extensive materials that would be subject to multiple stages of rigorous review. CP 2936-78. The reviewers also considered external evaluations from scholars outside the University. CP 2979-92, 2915, 3504-05, 3510. This was Dr. Marshall's chance to make her case that she deserved the honor of what is essentially a lifetime appointment. CP 2862.

To obtain tenure and promotion to associate professor, Dr. Marshall needed to demonstrate "a record of substantial success" in *both* research *and* teaching, unless the University chose to recognize this as an "unusual" case in which "an

outstanding record in one of these activities" could result in promotion and tenure. CP 3105 (Faculty Code Section 24-34(A)(2)). But even in such "unusual" cases, not all "outstanding" records may justify the result of a lifetime appointment. *Id.* ("[I]n unusual cases an outstanding record in one of these activities *may* be considered sufficient" for tenured appointments (emphasis added)).

Dr. Marshall's many tenure reviewers concluded nearly unanimously that she did not meet those standards. By the time Dr. Marshall applied for tenure, three of the five total classes she taught (which constituted 100 percent of her graduate teaching experience) received extremely poor evaluations—with an average adjusted combined median score of just 2.0 out of 5. CP 3508-09. Reviewers considered this information in the context of other aspects of Dr. Marshall's performance—including her attempt to point to more positive examples of her teaching from two undergraduate classes and peer reviews, along with her strong research record—but ultimately concluded she

had not demonstrated sufficient success in teaching to meet the University's high standards for certain merit increases or tenure. *See* CP 2919-21, 2902-03, 2897, 3504, 3509, 3511. Reviewers also explicitly considered the potential for racial bias to influence teaching evaluations, but recognized potential bias alone could not account for such poor evaluations. *E.g.*, CP 2919-21, 3508.

Far from a "rubber stamp," as Dr. Marshall claims (Opening Br. 50), the record demonstrates multiple levels of reviewers carefully considered her tenure materials. First, her four-person promotion and tenure committee unanimously recommended against tenure. CP 2917-30. Then the tenured faculty in her department—with the exception of two who abstained, including Dr. Young—all recommended against tenure as well. CP 3171, 2901-04. The interim director of her program (after Dr. Young's term ended) and the Seattle-based dean of the School of Social Work also did not support tenure. CP 2893-900, 2915-16. The review by the campus-wide elected committee—consisting entirely of faculty outside her

department—was mixed, with two votes in her favor, two votes against, and the remaining three committee members were absent or abstained. CP 3503-06. Finally, Vice Chancellor Purdy and Chancellor Pagano recommended against tenure. CP 3508-12.

When Dr. Marshall's application reached the Provost, only two people who reviewed her materials had voted in favor of tenure, while 17—including everyone casting a vote from within her school and in the field of social work—concluded Dr. Marshall had not earned tenure. CP 3508, 3511-12. Provost Mark Richards—whom Dr. Marshall does not accuse of discrimination—concurred, issuing the final decision that Dr. Marshall had not earned tenure. CP 2865. Provost Richards carefully reviewed Dr. Marshall's full record, and specifically "took into consideration concerns raised by the candidate . . . regarding racial bias, systemic race discrimination, and retaliation." *Id.* He did not see evidence supporting Dr. Marshall's contentions that the review process was "unfair, discriminatory, or factually unsubstantiated," and

instead concluded it was a "performance based assessment focused on deficiencies in the teaching record." *Id.* Provost Richards recognized that an "outstanding record" in research "may be considered sufficient" for promotion and tenure in "unusual cases," but he did not find sufficient evidence to support Dr. Marshall's suggestion that "her record of research and scholarship" alone justified promotion and tenure. *Id.*

D. A neutral investigator considered Dr. Marshall's claims and concluded no discrimination, harassment, or retaliation occurred.

Although she was reappointed, Dr. Marshall raised concerns about discrimination in fall 2018. The University Complaint and Resolution Office ("UCIRO") investigates complaints about discrimination and retaliation. CP 3157-59.

Because Dr. Marshall wanted UCIRO to review allegations of discrimination covering more than one year, she asked Chancellor Pagano to support an institutional investigation. CP 2760, 3147, 3159 (scope of investigation varies based on employee versus administrator initiating complaint).

He agreed, and asked UCIRO to investigate Dr. Marshall's concerns. *Id.*

Beth Louie, a neutral investigator and UCIRO employee, conducted the investigation. CP 4582, 3159. Her thorough process included interviewing 20 witnesses (including Dr. Marshall), along with reviewing "all relevant documentation available." CP 2855, 4582-83. After analyzing Dr. Marshall's allegations and the evidence collected, Ms. Louie concluded the facts did not support any finding of discrimination, harassment, or retaliation. CP 2855, 4583. She summarized her findings in a lengthy outline and shared her conclusions with Dr. Marshall. CP 4582-97, 2855, 2746-47.

The investigation covered a wide range of employment concerns that Dr. Marshall raised (and raises again here). For some issues, Ms. Louie concluded the incidents were unsupported or taken out of context. CP 4590-91 (no other evidence supported Dr. Marshall's assumption that a colleague spoke negatively about her to students), 4597 (Dr. Young's

comment about "fit" related to Executive Order 45, "which sets out considerations for promotion and tenure and says consideration must also be given to the ways in which the candidate will fit into the present and foreseeable future of the academic unit").

For other complaints, the investigator concluded Dr. Marshall received what she wanted. CP 4594 ("Ultimately, the grant is being managed by Seattle, which is what Dr. Marshall wanted"), 4595 ("Ultimately, Dr. Marshall was granted a research leave without having to reapply"), 4596 ("Ultimately, . . . Dr. Marshall did not have to teach the research methods class").

The investigator recognized some miscommunications, but concluded these issues did not result in differential treatment, and did not rise to the level of unlawful discrimination, harassment, or retaliation. CP 4594, 4597 (miscommunication regarding grant administration); 5496-97 (initial confusion about

service time and course release); 4593-97 (finding no differential treatment relating to various perceived workplace issues).

Ms. Louie explained Dr. Marshall's teaching evaluations "drove" many of the decisions Dr. Marshall was concerned about, and she did not find the University's reliance on this information to be "invalid or discriminatory." CP 2802.

E. Procedural history

In September 2019, Dr. Marshall filed a complaint alleging discrimination, retaliation, harassment, and whistleblowing claims, along with aiding and abetting claims against the individually-named defendants. CP 38. Defendants moved for partial summary judgment to dismiss certain claims prior to the completion of Dr. Marshall's deposition. CP 68. That hearing was stricken due to changes in the case schedule, and Defendants later re-noted their partial summary judgment motion to be heard with a new motion for summary judgment seeking dismissal of Dr. Marshall's remaining claims. CP 2717, 2727.

As Judge Kirkendoll explained at the summary judgment hearing in October 2021, she read the voluminous summary judgment record, which was more than two thousand pages. Report of Proceedings at 5:17-18; *see generally* Clerk's Papers. Following more than an hour of argument and active questioning of both sides, Judge Kirkendoll took the matter under advisement, then granted Defendants' motions and dismissed all of Dr. Marshall's claims. *Id.* at 19:20-21:16, 39:18-43:16, 49:9, 55:7-10; CP 4904-07.

IV. ARGUMENT

When she was hired, Dr. Marshall recognized teaching and research as equally vital components to success as a faculty member. Unfortunately, she failed to deliver on the essential teaching component. Multiple reviewers over several years consistently recognized concerns with Dr. Marshall's teaching—especially negative evaluations and record low scores from every graduate level course she taught—and ultimately declined to

grant tenure due to Dr. Marshall's failure to meet the University's standards.

Dr. Marshall now claims racial discrimination and retaliation, but she cannot show anything other than her poor teaching motivated any adverse decision. The University followed its established procedures to review Dr. Marshall's tenure application, and 18 of 20 reviewers concluded she had not met the University's standard for teaching. There is no evidence whatsoever that her race was a factor for any of these reviewers, and for most, Dr. Marshall has not even accused them of being racially biased. Dr. Marshall is essentially asking this Court to adopt a presumption that if a decision is adverse, it must be because of race. But that is not the law.

The trial court properly dismissed Dr. Marshall's discrimination, retaliation, and whistleblower claims on summary judgment. This Court should conclude the same on its de novo review. *See Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 569, 459 P.3d 371 (2020) (citing CR 56(c))

A. Generalized commentary, inadmissible evidence, and purported experts do not support Dr. Marshall's claims.

Throughout her brief, Dr. Marshall cites to documents including others' impressions (often relying on hearsay or lacking personal knowledge) or her purported experts' opinions to boldly claim "racism is running rampant" on campus. Opening Br. 8-14. This generalized commentary and its inadmissible components do not support her claims.

Like the trial court, this Court should not consider inadmissible evidence when deciding summary judgment. CR 56(e), CP 4799-4800 (objecting to inadmissible anonymous statements and hearsay, lack of personal knowledge, and improper opinions in Dr. Marshall's summary judgment materials). Even if it were considered, this purported evidence is too attenuated to support Dr. Marshall's claims. For instance, she describes historical impacts on students' and children's experiences dating back centuries. Opening Br. 8-10. While she points to general "issues" for "Black women seeking tenure," she

fails to provide evidence connecting those "issues" to her employment. *See* Opening Br. 10 (citing "barriers" relating to administrators not valuing research, which Dr. Marshall does not claim here; same for additional "burdens" of higher committee workload). The same goes for the campus climate surveys she cites: the main "issues" she alleges *others* experienced do not relate to her claims. *See* Opening Br. 13 (citing a "double standard" for tenure decisions for white faculty versus faculty of color based on evaluations of *research* publications and quality—issues that Dr. Marshall does not raise here).

Even if they were admissible, there is no connection between others' experiences and Dr. Marshall's employment. Significant issues with Dr. Marshall's teaching, rather than discrimination or a hostile environment, drove the actions she challenges.

B. Dr. Marshall's racial discrimination claims were properly dismissed.

The trial court properly dismissed Dr. Marshall's disparate treatment claim, which "occurs when an employer treats some

people less favorably than others because of race." *Alonso v. Qwest Commc'ns Co.*, 178 Wn. App. 734, 743, 315 P.3d 610 (2013). Defendants are entitled to an inference of non-discrimination given their enthusiastic efforts to recruit her. Even without this inference, Dr. Marshall cannot show discrimination. The record demonstrates that her poor teaching record motivated the actions at issue.

1. An inference of non-discrimination applies here.

Defendants are entitled to an inference of non-discrimination. When similar decisionmakers are responsible for both hiring the plaintiff and alleged adverse employment actions that occurred later, courts apply an inference that the plaintiff "was not discharged because of any attribute the decision makers were aware of at the time of hiring." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 189, 23 P.3d 440 (2001), *as amended on denial of reconsideration* (July 17, 2001), *abrogated in part on non-pertinent grounds by Mikkelsen v. Pub. Util. Dist. No. 1*, 189 Wn.2d 516, 404 P.3d 464 (2017); *Griffith v. Schnitzer Steel*

Indus., Inc., 128 Wn. App. 438, 453, 115 P.3d 1065 (2005). Courts "must" take this "strong inference" into account on summary judgment. *Schechner v. KPIX-TV*, 686 F.3d 1018, 1026 (9th Cir. 2012) (quoting *Coghlan v. Am. Seafoods Co. LLC.*, 413 F.3d 1090 (9th Cir. 2005)).

Dr. Marshall attempts to defeat the presumption by stating she was hired by a "committee," Opening Br. 53, but the inference "does not impose overly narrow definitions to the requirements that the decision makers be the 'same'[.]" *Griffith*, 128 Wn. App. at 454. Indeed, "all that is required is that one of the decision makers involved in the promoting and firing be the same." *Id.*; *see also Hill*, 144 Wn.2d at 189 n.12. That standard is easily satisfied here. Dr. Young was the program director who advocated for another position and higher salary for Dr. Marshall, and has now been accused by Dr. Marshall of alleged discrimination. CP 3168. There is overlap between others involved in her hiring and later actions that she challenges as well. *E.g.*, CP 3171, 3174, 3064, 2917-18 (Drs. Casey and Emlet,

who respectively chaired and served on Dr. Marshall's search committee, recommended tenure denial).

Like other cases applying the inference, Dr. Marshall cannot provide a plausible answer to this question: "if the employer is opposed to employing persons with a certain attribute, why would the employer have hired such a person in the first place?" 144 Wn.2d at 188-90. The logic supporting this inference is particularly compelling here, where the employer was actively looking to increase its diversity and negotiated for a higher salary at Dr. Marshall's request. CP 3168. Dr. Marshall does not cite any evidence suggesting individuals who advocated for her hiring later "developed a bias" against those in her protected class. *See Coghlan*, 413 F.3d at 1097. There is absolutely no evidence the University was racially biased against her, and the same actor inference should be applied.

2. Dr. Marshall cannot show direct evidence of discrimination.

a. Facially neutral comments are not direct evidence of discrimination.

Dr. Marshall fails to present any direct evidence of racial discrimination. "Direct evidence" is evidence, such as discriminatory remarks or racial epithets directed at a plaintiff, that requires no inference of racial animus. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998), *as amended* (Aug. 31, 1998); *see also Alonso*, 178 Wn. App. at 744-45 (supervisor used derogatory terms and directly referenced protected classes).

Dr. Marshall points to a few comments that she claims were discriminatory. Opening Br. 42-44. Setting aside the fact that she ignores crucial context or misconstrues the record (as described below), nothing she cites constitutes *direct evidence* of discrimination. Each of these alleged remarks requires an inference to assume any racialized meaning or animus. *Cf. Godwin*, 150 F.3d at 1221. Unlike the comments at issue in

Alonso, which were clearly based on the plaintiff's protected classes, here, Dr. Marshall points to comments that can unquestionably be—and were—used in nondiscriminatory ways, such as "good fit" and "collegiality." Dr. Marshall claims these terms can be used as "code words" to conceal discrimination, but there is no evidence that happened here. These are also simply words, with established, non-discriminatory meanings. When an "ambiguous statement can be interpreted in various ways," that statement "cannot serve as direct evidence of discrimination." *Preston v. Clayton Homes, Inc.*, 167 F. App'x 488, 492 (6th Cir. 2006) ("fit-the-mold" statement was not direct evidence of discrimination). Dr. Marshall has not provided any direct evidence here.

b. The comments Dr. Marshall cites are not otherwise discriminatory.

Not only do the non-discriminatory remarks that Dr. Marshall describes not constitute *direct* evidence of racial discrimination—they also fail to raise an *inference* of discrimination. *See* Opening Br. 15-17, 42-44. Dr. Marshall

attempts to impute racial motives to a few facially neutral statements, but the record does not support her speculation.

For instance, the undated, unverified comment attributed to Chancellor Pagano about finding a "good" candidate was not discriminatory. Opening Br. 15. This alleged comment was not related to Dr. Marshall. While one person (Dr. Lavitt) "took this to mean" Chancellor Pagano was referring to a "good person of color," CP 3524, she does not reference any intent to "tokenize" people of color, and there is no evidence to support Dr. Marshall's speculation of improper motives. Opening Br. 42. In fact, the statement shows Chancellor Pagano wanted to recruit and hire "*more* persons of color," and was committed to finding a good candidate. CP 3524 (emphasis added). Even if Chancellor Pagano's statement about hiring were relevant to Dr. Marshall's circumstances (which it is not), it does not show discrimination.

Comments attributed to Vice Chancellor Purdy—purportedly relating to "collegiality" and "fit"—also do not support Dr. Marshall's claims. Opening Br. 16 (citing CP 3520).

That discussion related to adopting policies and criteria *if* faculty wanted to consider these factors in the future (CP 3520)—a method of ensuring they would be fairly and uniformly applied. The words were not directed at Dr. Marshall or excluding people of color. In fact, Dr. Marshall recognizes Dr. Purdy "overrule[d]" faculty members' recommendation against Dr. Marshall's reappointment around this time, which belies any attempt to impute discriminatory motives to Dr. Purdy. Opening Br. 16; *see* CP 3047.

The statement attributed to Dr. Young about "fit" is also not discriminatory. The statement occurred in March 2016, predating the statute of limitations, and just before Dr. Marshall received a ***meritorious*** review. CP 171, 3057. Dr. Marshall claims "'fit' often is a code word to perpetuate bias," but she cannot show any such "bias" was operating here. Opening Br. 16 (citing CP 3520). Dr. Young was asking "about fit as defined by Executive Order 45," which sets out considerations for promotion and tenure states, "[c]onsideration must also be given

to the way in which the candidate will fit into the present and foreseeable future of the academic unit." CP 4597, 3165-66; *see also* CP 4597 (neutral investigator concluding statement was not discriminatory), 4374 (Dr. Young's notes stating, "We discussed 'fit' in relation to what she wanted to teach"). Discussing how a faculty member's teaching interests fit within the needs of the program is not evidence of racial discrimination.

Of the comments attributed to Dr. Emlet, some of those statements were not made by Dr. Emlet at all, and none have anything to do with Dr. Marshall's race. *See* Opening Br. 16, citing CP 279-86 (citation does not show "he criticized her demeanor"), CP 3718 (Dr. Marshall emailed Dr. Emlet to "[t]hank" him for "sharing faculty perceptions and suggestions on what I could do to have a successful reappointment this year," and summarized suggestions for responding to "faculty's perception that I am aloof and not engaged," including faculty suggesting not using her computer as much at faculty meetings), Opening Br. 17 (citing her own narrative or emails she authored

attributing other statements to Dr. Emlet, none of which shows discrimination even if the statements were admissible).

Next, Dr. Marshall fails to explain how another professor's remarks that he thought Dr. Marshall treated *him* with bias show any discrimination against *her*. Opening Br. 17.

Finally, Dr. Marshall claims a colleague "went to Dr. Marshall's students and criticized Dr. Marshall," Opening Br. 17, but the record does not support this assertion. Dr. Marshall mostly cites to her own narrative description where she explains why she "assumes" Dr. Garner may have talked to her students. Opening Br. 17 (citing CP 4258, 4329). She also cites interview notes from the UCIRO investigation, but those notes show students came to Dr. Garner to express concerns about Dr. Marshall's teaching—they do not suggest Dr. Garner criticized Dr. Marshall. CP 4437, 4486-92; *see also* CP 321-22 (Dr. Garner denied Dr. Marshall's accusation), 4589-90 (UCIRO investigator determined Dr. Marshall's complaint about Dr. Garner was unsubstantiated). And again, even if these

comments could be substantiated, they in no way show racial discrimination against Dr. Marshall. Dr. Marshall's speculation, and attempt to introduce her own self-serving hearsay, are not evidence of discrimination.

Dr. Marshall cannot point to any direct evidence of racial discrimination, and the various comments she cites do not support her discrimination claims.

3. Dr. Marshall cannot meet her burdens under the *McDonnell Douglas* standard.

Without direct evidence of racial discrimination, Dr. Marshall must satisfy the burden-shifting standard under *McDonnell Douglas* to avoid summary judgment dismissal. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). She fails to do so.

a. Prima facie case

Under *McDonnell Douglas*, Dr. Marshall bears the initial burden of establishing "specific and material facts to support each element of his or her prima facie case" to avoid dismissal. *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997). These

elements require a plaintiff to show that (1) she is a member of a protected class; (2) she suffered a tangible adverse employment action; (3) the action occurred under circumstances that raise a reasonable inference of unlawful discrimination; and (4) she was doing satisfactory work. *See Marin v. King Cty.*, 194 Wn. App. 795, 808-09, 378 P.3d 203 (2016).

Dr. Marshall claims she suffered three types of adverse actions: she claims she was "blocked" from "reappointment twice, merit raises twice, and tenure." Opening Br. 49. Even assuming all of these decisions could constitute tangible adverse actions,[4] Dr. Marshall fails to meet her burden to demonstrate she was doing "satisfactory work" (fourth element), or that any tangible adverse employment actions occurred under circumstances suggesting a reasonable inference of discrimination (third element).

[4] For example, Dr. Marshall's reappointment was granted after postponing for a year to give her a chance to show improvement, and that postponement did not affect her title, compensation, job duties, or timeline for applying for tenure. CP 2861.

Given her poor teaching, Dr. Marshall cannot show she was performing satisfactory work. Of the 20 reviewers who considered Dr. Marshall's tenure materials, 18 concluded she had not established substantial success in teaching. Section III.B.5. While reviewers considered more than just evaluations, *id.*, it is notable that Dr. Marshall's teaching evaluations received especially low scores in years when she received non-meritorious reviews. *See* Sections III.C.2-3. Of the five classes Dr. Marshall had taught by the time of her tenure application, three had very low teaching scores, with combined median course ratings of 2.8, 1.3, and 1.9 out of 5. CP 3014, 3020, 3026. Those evaluations included negative assessments of Dr. Marshall's use of class time, clarity, and evaluative and grading techniques, among other aspects. *See* Sections III.C.2-4. Narrative comments emphasized problems with lack of preparation, poor time management, disorganization, and more. *Id.*

Dr. Marshall acknowledges those scores were low, CP 2763-64, and attempts to highlight other aspects of her

performance (especially her research) instead. Opening Br. 50. But no matter how strong her research, she cannot show her teaching was "satisfactory" for purposes of establishing her prima facie case. University policies established long before Dr. Marshall arrived emphasize the importance of quality teaching, and she was regularly advised she needed to demonstrate improved teaching in order to be successful. CP 3102-03; Sections III.C.1-5. Dr. Marshall may wish the University's criteria were different,[5] and may prefer to have her research weighted more strongly than her teaching, but that is not up to her. *Chen*, 86 Wn. App. at 191 (employee's duties "were for the State to formulate," not the employee). The University is allowed to hold its faculty to high teaching standards, whether they teach one class or 100. There is no evidence the University's

[5] Dr. Marshall claims the University's "focus on student evaluations" is "arbitrary," Opening Br. 49. However, the Faculty Code, developed through shared governance with its faculty, *requires* consideration of student evaluations, CP 3103 ("The assessment of teaching effectiveness *shall* include student and faculty evaluation.") (emphasis added), and the University considered other appropriate factors as well. *E.g.*, CP 2919-21.

assessment of her performance was based on race, and she cannot fulfill her burden of demonstrating her job performance was satisfactory.

Dr. Marshall also fails to demonstrate any "circumstances that raise a reasonable inference of unlawful discrimination" to support the third element of her prima facie case. *Marin*, 194 Wn. App. at 808. A plaintiff can satisfy this element by showing she was treated less favorably than a similarly situated employee outside her protected class, *id.* at 810, but Dr. Marshall cannot meet that standard. The few purported "comparators" she references were not similarly situated (none had a comparably low teaching record), and Dr. Marshall was not treated less favorably. *See* Section IV.B.3.c. Dr. Marshall cannot establish a prima facie case of discrimination.

b. Legitimate, non-discriminatory reasons

Defendants have met their burden of demonstrating legitimate, non-discriminatory reasons for the employment actions Dr. Marshall challenges. *See Domingo v. Boeing Emps.'*

Credit Union, 124 Wn. App. 71, 87-88, 98 P.3d 1222 (2004), *abrogated in part on non-pertinent grounds by Mikkelsen*, 189 Wn.2d 516. Dr. Marshall's poor teaching motivated all the decisions at issue. During the few years when her teaching evaluations were satisfactory, she was deemed meritorious and received a raise. *See* Sections III.C.1, 4. But after her first round of "extremely low" student evaluations in her second year, CP 2795, Dr. Marshall's performance was deemed non-meritorious due to concerns about her teaching. *See* Section III.C.2.

Dr. Marshall's poor graduate teaching evaluations influenced the decision to postpone her reappointment for one year to give her an opportunity to improve, and her failure to demonstrate substantial success in teaching was a significant deciding factor at each stage of her subsequent reappointment review and her later tenure review as well. CP 2794-96 (faculty noting teaching concerns during first reappointment review), 3037 (same), 3038-39 (same from Executive Vice Chancellor of

Academic Affairs); CP 3052-53, 3043-48, 2861-62 (teaching concerns during second reappointment review); CP 2920-21, 2902-03, 2896-97, 2891, 2915, 3508-09 (teaching concerns during tenure review).

Contrary to Dr. Marshall's assertions, her negative teaching evaluations reflected more than just a small percentage of her overall work, and the University did not inappropriately weigh those evaluations to the detriment of other factors. Opening Br. 14-15 (inaccurately claiming 500-level teaching constitutes only "3% of Dr. Marshall's time," when it constituted the majority of her teaching experience leading up to tenure review, and constituted 100 percent of her teaching during three academic years); *see* CP 3103 (Faculty Code requires consideration of student evaluations among criteria assessing teaching). University decisionmakers and reviewers considered other factors as well, and consistently concluded Dr. Marshall failed to meet the University's standards for effective teaching. *See* CP 2919-21, 2902-03, 2897, 3504, 3509, 3511. These

legitimate, non-discriminatory reasons satisfy Defendants' burden under *McDonnell Douglas*.

c. Pretext and comparators

Given Defendants' legitimate, non-discriminatory reasons for the actions at issue, Dr. Marshall must either demonstrate that (1) this explanation is pretextual, or (2) race was otherwise a substantial factor motivating the adverse decisions. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 446-47, 334 P.3d 541 (2014). She cannot show either. Evidence of pretext "must be specific and substantial in order to create a triable issue." *Mondero v. Salt River Project*, 400 F.3d 1207, 1213 (9th Cir. 2005).

Dr. Marshall cannot show the University's consideration of her poor teaching record was a "pretext" to conceal race discrimination. Nearly every person at every layer of her tenure review concluded Dr. Marshall's teaching record was insufficient to earn tenure. CP 3508. Contrary to Dr. Marshall's assertion, there is no evidence to suggest the University simply "relie[d] on discriminatory animus of supervisors below" to deny

her tenure.[6] Opening Br. 49-50. The record does not contain any evidence of "animus," and her tenure review shows *multiple* layers of individuals and committees carefully considered her materials and independently concluded her teaching was not sufficient for tenure. *See* CP 2920-21, 2902-03, 2896-97, 2915, 3508-09. Even those supportive of Dr. Marshall and those who she does not accuse of discrimination noted problems with her teaching. *E.g.*, CP 3038-39, 3050-53 (Dr. Lavitt noting teaching concerns), 2794-96 (committee chaired by Dr. Harris noting teaching concerns).

Dr. Marshall attempts to emphasize other areas of her performance, including strong research and aspects of her teaching that she claims were positive, to argue Defendants' reliance on her low teaching evaluation scores was pretextual. Opening Br. 50-52, 30-33. These arguments are insufficient to

[6] Dr. Young, whom Dr. Marshall accuses of discrimination, did not even participate in the major employment actions Dr. Marshall challenges—including her first non-meritorious review, her first reappointment review, and her tenure review. CP 3169-71.

meet her burden. "An employee's assertion of good performance to contradict the employer's assertion of poor performance does not give rise to a reasonable inference of discrimination" to defeat summary judgment on the pretext prong. *Mackey*, 12 Wn. App. 2d at 582 (quoting *Chen*, 86 Wn. App. at 191); *see also Fulton v. DSHS*, 169 Wn. App. 137, 162, 279 P.3d 500 (2012).

Additionally, Dr. Marshall fails to provide a reasonable basis to challenge Defendants' conclusions about her poor teaching. Dr. Marshall criticizes Defendants' reliance on student evaluations, Opening Br. 30-33, but fails to acknowledge the University *must* consider this feedback among its criteria evaluating teaching performance. *See* CP 3103 ("The assessment of teaching effectiveness *shall* include student and faculty evaluation." (emphasis added)). Contrary to Dr. Marshall's assertions, University decisionmakers considered other evidence in evaluating her teaching as well, including peer reviews from three colleagues Dr. Marshall asked to sit in on her class. *See* CP 3045, 3047-48, 3505, 2919, 2902, 2897, 3509. Reviewers

recognized positive feedback from peer evaluations, but concluded Dr. Marshall's overall record did not show substantial success in teaching. *Id.* Dr. Marshall fails to show any error (let alone discriminatory intent) in deciding that peer evaluators' comments from observing a few hours of class instruction failed to significantly outweigh the consistently low scores and negative feedback from students who attended masters-level classes throughout each quarter at issue and were subject to the poor communication and disorganization they reported experiencing from Dr. Marshall.[7] The record contains ample evidence of concerns about Dr. Marshall's teaching, and University decisionmakers appropriately considered all aspects

[7] Dr. Marshall, citing Professor Kalikoff, speculates the students themselves may have been racially biased. Opening Br. 33. Despite no evidence of bias on the face of these evaluations, University reviewers acknowledged the possibility that implicit bias could affect students' evaluations, and took that information into account when considering her record and still concluding her teaching was deficient. CP 3045, 3048, 2919-21, 2897, 3508-09 ("While factors such as race and gender can negatively impact quantitative student evaluations, we have not found nor does the [tenure and promotion] file cite any resource that suggests bias alone could account for such low scores").

of her performance in concluding she failed to earn tenure or certain merit raises. *See* Section III.C.2-5. Dr. Marshall cannot show pretext.

In addition to her failure to demonstrate pretext, Dr. Marshall cannot show race was a "substantial motivating factor" in any tangible adverse employment action. *Mackey*, 12 Wn. App. 2d at 583 (citing *Mikkelsen*, 189 Wn.2d at 527). Of the 20 faculty members and administrators who reviewed Dr. Marshall's tenure file, 18 concluded she had not established substantial success in teaching sufficient to earn tenure. *See* Section III.C.5. Dr. Marshall has no evidence—certainly not the required level of "specific and substantial evidence"—that race was a substantial factor for any of those reviewers, let alone all 18 of them. *Mondero*, 400 F.3d at 1213; *see also* CP 2865 (Provost considered Dr. Marshall's concerns and determined the review process was not unfair or discriminatory).

The stray remarks that Dr. Marshall references relating to hiring and fit do not demonstrate race was a factor in any of the

employment decisions she challenges—and certainly not a "substantial motivating factor," as she must demonstrate. Opening Br. 51. The comment attributed to Chancellor Pagano about hiring is not discriminatory for the reasons described above (Section IV.B.2.b), and Dr. Marshall does not challenge her hiring process as an adverse action.

The question from Dr. Young about Dr. Marshall's fit in 2016 (Opening Br. 51) also was not discriminatory (as described in Section IV.B.2.b), and even construed most favorably to Dr. Marshall, does not demonstrate her race was a "substantial motivating factor" among the many different evaluators involved in allegedly adverse actions. *See* CP 3055-56, 2758 (Dr. Marshall received a positive review from Dr. Young and a merit raise in 2016), 3170-71 (Dr. Young did not participate in Dr. Marshall's first reappointment review or tenure review); *see* Sections III.C.2-5 (citing wide variety of reviewers involved); *see also* CP 4597 (explaining race-neutral, appropriate reason for use of "fit").

Even if these remarks related to adverse actions Dr. Marshall challenges (which they do not), and even if they reflected negative attitudes based on race (which they did not), two stray remarks over six years are not sufficient to demonstrate discrimination was a substantial motivating factor.

Finally, Dr. Marshall's brief reference to alleged comparators is insufficient to demonstrate pretext or show that race was a substantial factor motivating decisions against her. Opening Br. 50-51. Dr. Marshall fails to show any comparator who was similarly situated to her but treated differently. *See Domingo*, 124 Wn. App. at 81 (plaintiff must show she was treated less favorably than similarly situated employees); *Marin*, 194 Wn. App. at 810 ("Similarly situated employees must have the same supervisor, be subject to the same standards, and have engaged in the same conduct.") (quotation and citation omitted).

For instance, Dr. Marshall complains that another faculty member, Dr. Sarah Hampson, was allowed to have someone from outside her department on her promotion and tenure

committee even though Dr. Marshall was not. Opening Br. 37, 51. There is no evidence in the record regarding Dr. Hampson's research or teaching performance, and Dr. Marshall has not met her burden to demonstrate Dr. Hampson is an apt comparator. Moreover, as Dr. Hampson says in her declaration, she went up for tenure the year *before* Dr. Marshall, and UWT started enforcing a different committee rule the next year. CP 3388-89. There is no evidence this race-neutral policy change unfairly targeted Dr. Marshall. It was based on a change to the Faculty Code, which faculty approved, and which applied University-wide. While Dr. Marshall may have preferred a different committee, there is no evidence to suggest enforcement of this policy beginning in 2020 had any racial motivation or disproportionate effect. Neither Dr. Marshall nor Dr. Hampson suggests that employees applying for tenure in 2020—when Dr. Marshall applied—were treated differently than Dr. Marshall. Additionally, non-SWCJ faculty members *did* participate in Dr.

Marshall's tenure review, and the majority did not recommend tenure. CP 3503, 3508.

Dr. Marshall also points to two documents for alleged comparator evidence that she failed to timely introduce at summary judgment. Opening Br. 36-37; CP 5154-55 (explaining Dr. Marshall's failure to file exhibits at issue). The trial court denied Dr. Marshall's motion to add these documents to the summary judgment record after the fact, CP 4902-03, and Dr. Marshall has neither assigned error to, nor appropriately argued, that issue in her brief. RAP 10.3(a)(4), (6); Opening Br. 3-4, 36-37 (noting forthcoming request to unseal, but not arguing to include in the summary judgment record). Even if these documents are now considered, they fail to show appropriate comparators.

Dr. Marshall asserts "Professor X is an excellent comparator," but offers no evidence in support of that conclusion. Opening Br. 36-37. In fact, Professor X is not similarly situated. *See Domingo*, 124 Wn. App at 82-83. Unlike

Dr. Marshall, Professor X was "meeting" teaching expectations, and she "receives generally positive reviews." CP 5. Her "area of most concern" related to her scholarship. CP 6.

Even if Professor X's teaching record could be considered comparable, she was treated similarly: Professor X's reappointment was postponed for one year, and she was offered a mentor to assist with concerns identified during her reappointment review—just like Dr. Marshall. CP 5-6, 2861-62. Professor X is not a valid comparator, and Dr. Marshall fails to show she was treated less favorably. CP 3047.

Dr. Marshall also briefly references a "chart" that she claims "shows how unusual it would be for a faculty member not to be reappointed" at the end of their third year, complaining that Dr. Young did not support her reappointment. Opening Br. 36 (citing CP 12-17). But Dr. Marshall *was* reappointed at the end of her third year. CP 3047. She again cannot show she was treated less favorably, even if she had offered sufficient detail to

claim everyone on that chart was similarly situated to her (which she has not).

Dr. Marshall cannot show the University ever granted tenure (or otherwise treated more favorably) faculty with comparable teaching records, and she fails to provide any details that would allow the Court to assess whether other individuals are appropriate comparators. *See Domingo*, 124 Wn. App at 82-84 (alleged comparators were not sufficiently similar); *Marin*, 194 Wn. App. at 810 (same).

Dr. Marshall fails to present evidence of sufficiently related comparators who were treated more favorably, and she cannot otherwise show discrimination was a substantial factor in the employment decisions she challenges.

4. Universities are best suited to evaluate candidates for tenure.

Even if Dr. Marshall could show discrimination (which she cannot), she cannot justify one type of extraordinary relief she seeks: requesting "[i]nstatement to a tenured faculty

position." CP 2447. The trial court properly granted summary judgment on this issue.

Dr. Marshall cites authority for awarding a remedy of "reinstatement," but fails to acknowledge she is seeking much more than reinstatement to a position she previously held. Opening Br. 67-68. Instead, her demand for tenure amounts to a promotion to a *new* position, one that essentially amounts to a lifetime appointment. *See* CP 3047, 3139-40 (granting tenure is "a specific act, even more significant than promotion in academic rank," and typically lasts for "the rest of" employees' "academic careers" absent exceptional circumstances).

Imposing this drastic remedy here would be especially inappropriate, considering the substantial deference courts give higher education institutions in decisions relating to tenure. As Judge Friendly recognized, courts do not sit as "Super-Tenure Review Committees." *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980) (quotation and citation omitted). Courts respect the academic freedom universities have in determining who is

worthy of tenure. *See id.* (recognizing a "long tradition of academic freedom" in determining who may teach); *Megill v. Bd. of Regents.*, 541 F.2d 1073, 1077 (5th Cir. 1976) (courts should be "loathe to intrude into internal school affairs"). Indeed, courts are not well-equipped to evaluate a professor's scholarship and teaching. *See Okruhlik v. Univ. of Ark.*, 395 F.3d 872, 879 (8th Cir. 2005); *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1067 (9th Cir. 2002), *amended sub nom. Mukhtar v. Cal. State Univ., Hayward*, 319 F.3d 1073 (9th Cir. 2003), *overruled on other grounds by Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2014). This Court can, and should, consider whether race was inappropriately considered, and there is no evidence that it was. This Court cannot, and should not, second-guess the University's extensive evaluation of her performance for tenure. Even if the Court were to find some evidence of discrimination, there are other remedies available. *See* RCW 49.60.030(2). The Court should not grant

tenure or reverse the trial court's decision dismissing Dr. Marshall's case.

C. Dr. Marshall's hostile work environment claims were properly dismissed.

1. Dr. Marshall cannot show harassment that constituted a hostile work environment.

Beyond her disparate treatment claim, Dr. Marshall lists a collection of workplace complaints that she claims amount to a hostile work environment, but she fails to meet that standard. Opening Br. 59-67. To prove a "hostile work environment," a plaintiff must show "harassment" that (1) was unwelcome, (2) was based on her protected class (here, race), (3) affected the terms and conditions of employment, and (4) is imputable to the employer. *See Antonius v. King Cty.*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). The third element "requires that the harassment be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Id.* (quotation and citation omitted). "The law does not usually allow a remedy in a hostile work environment case unless there is a

pervasive pattern of unlawful treatment over a period of time." *Id.* at 268.

Dr. Marshall cannot show actionable racial harassment. There is absolutely no reference anywhere in the record to any negative comments or actions directed at Dr. Marshall based on her race. At most, she points to isolated workplace frustrations that do not relate to her race, or facially neutral comments that she claims could harbor bias. Opening Br. 64-65 (describing two categories of alleged "hostile acts": "inconsistent policies" and "coded language"). Neither is sufficient to survive summary judgment.

First, Dr. Marshall claims she experienced "bullying through inconsistent policies." Opening Br. 63. The alleged conduct she cites—ranging from decisions about whether she needed to re-apply for research leave, to whether Dr. Harris could sit on Dr. Marshall's reappointment committee while she was on sabbatical—does not constitute bullying. Opening Br. 63-64. Every instance where an employee disagrees with an

employer is not bullying or discrimination. In a large bureaucratic environment such as the University, it is not surprising there can be miscommunications about policies or different interpretations by different units. For many of the issues Dr. Marshall describes, she obtained the result she wanted, and for others, she cannot show any policy was inconsistently applied against her. *E.g.*, CP 4595 ("Ultimately, Dr. Marshall was granted a research leave without having to reapply"), 320 (Dr. Young invited Dr. Harris to sit on Dr. Marshall's reappointment committee), 4593-97 (finding no harassment relating to various perceived workplace issues), 2777 (Dr. Marshall was able to teach the classes she was interested in teaching); Section IV.B.3.c (no differential treatment for later enforcement of University-wide rule about outside committee members).

In addition, none of the alleged incidents constitutes *racial* harassment. Dr. Marshall simply cites workplace decisions with

which she disagrees.[8] *Id.* at 69-70. Conduct must be "of a *racial nature*," and "severe or pervasive enough that a reasonable person would find it hostile and abusive," to be actionable. *See Gibson v. King Cty.*, 397 F. Supp. 2d 1273, 1279-80 (W.D. Wash. 2005) (racist epithets and racially charged statements raised question of fact regarding whether workplace was racially hostile) (emphasis added). Dr. Marshall fails to meet that standard with any of the isolated workplace complaints she alleges here.[9]

[8] Discrete employment acts are not evidence of unlawful harassment. *E.g.*, *Goode v. Tukwila Sch. Dist. No. 406*, 194 Wn. App. 1048, *4 (2016) (unpublished) (incidents throughout employment such as exclusion from decision making processes may support a disparate treatment claim, but "do not constitute harassment for hostile work environment purposes"); *see* GR 14.1(a).

[9] Dr. Marshall claims the "internal investigator with UCIRO found that Director Young repeatedly came up with 'policies' that didn't exist," *id.* at 63, but fails to mention the investigator recognized reasonable explanations for many of the examples Dr. Marshall cites, and concluded *none* of those incidents constituted unlawful discrimination or harassment. Section III.D; CP 4590-97.

Second, the alleged "[c]omments and conduct" that Dr. Marshall describes do not support her hostile environment claim. Opening Br. 64-67; s*ee* Section IV.B.2.b (comments Dr. Marshall cites, including fit and collegiality, do not show bias). Again, she does not point to any conduct or comments that explicitly relate to her race, or that rise to the level of actionable harassment. "Asserting subjective offense to facially innocuous comments, especially without acknowledging how the comment was discriminatory, is not sufficient to prevent summary judgment dismissal." *Goode*, 194 Wn. App. at *3.

Setting aside whether allegedly coded language (terms that can equally convey nondiscriminatory intent) could support a hostile work environment claim in other circumstances, here, comments such as those relating to fit, collegiality, and hiring good candidates were clearly not used in discriminatory ways. *Cf.* Opening Br. 64-66 (citing allegedly coded language) *with* Section IV.B.2.b (explaining comments in context). In addition, the few isolated examples Dr. Marshall cites are not sufficiently

"pervasive" to support her claim, nor do they demonstrate an environment that "a reasonable person would find . . . hostile and abusive." *Gibson*, 397 F. Supp. 2d at 1279. Indeed, the WLAD is not "intended as a general civility code," and "not everything that makes an employee unhappy" supports a hostile work environment claim. *Alonso*, 178 Wn. App. at 747 (citations and quotations omitted). Much more explicitly abusive conduct has been dismissed as insufficiently severe or pervasive. *See Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 144, 265 P.3d 971 (2011) (twelve comments related to race were "in poor taste and offensive," but still failed to show a "racially hostile" work environment) (quoting and citing *In Lovelace v. BP Products North America, Inc.*, 252 Fed. App'x. 33, 40 (6th Cir. 2007).

Because Dr. Marshall fails to show any race-based harassment—and certainly not any that was pervasive enough to alter the terms of her employment—dismissal of her hostile work environment claim should be upheld.

2. The statute of limitations bars recovery for incidents predating August 1, 2016.

Even if Dr. Marshall's hostile work environment claim could survive summary judgment, she cannot recover for incidents predating the statute of limitations—prior to August 1, 2016. *See* RCW 4.16.080(2) (three-year statute of limitations); RCW 4.92.110 (60-day tolling period for tort claims); CP 18-40 (complaint filed September 30, 2019).

In order to recover for incidents beyond three years, acts supporting a hostile work environment claim must be sufficiently related to constitute a "unified whole" and a "single unlawful employment practice." *Antonius*, 153 Wn.2d at 268, 265 (quotation and citation omitted). Dr. Marshall cannot meet that standard. She cites a variety of isolated workplace incidents that are not sufficiently related to one another. *Cf. Crownover*, 165 Wn. App. at 144 ("Courts must consider whether the acts involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers.") *with* Br. 62-67 (describing different types of

incidents involving different individuals in different years). Dr. Marshall cannot show any incidents predating August 2016 are recoverable.

D. Dr. Marshall's retaliation claims were properly dismissed.

The trial court properly dismissed Dr. Marshall's retaliation claims. An employee alleging retaliation must first show: (1) she engaged in statutorily-protected activity; (2) her employer took adverse employment action against her; and (3) there was a causal link between her protected activity and the adverse action. *See Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). The burden then shifts to the employer to articulate a legitimate non-discriminatory reason for its actions, and then the employee must demonstrate that reason is pretextual, or that discrimination was a substantial motivating factor, to survive summary judgment. *Id.*; *Mackey*, 12 Wn. App. 2d at 571-72. Dr. Marshall's retaliation claims fail because, even if she could show protected activity, she cannot show any causal link with any adverse actions. She certainly

cannot show retaliation was a substantial factor in those decisions.

Dr. Marshall's retaliation argument asserts one instance of protected activity (reporting alleged race discrimination to Chancellor Pagano on August 15, 2018, which initiated a UCIRO investigation[10]), then claims "[a]ny action listed for disparate treatment and hostile work environment" that occurred after that date also qualifies as adverse action for her retaliation claim. Opening Br. 58. This does not meet the legal standard for retaliation. Dr. Marshall lists seven "examples"—ranging from excluding her from a conversation to various individuals recommending against tenure—but she does not identify whether any individuals involved in those alleged adverse actions[11] were

[10] As Dr. Marshall acknowledges, Chancellor Pagano was "supportive" of Dr. Marshall's desire for an investigation—so much so that he asked for the investigation himself. CP 2760, 3147.

[11] Some of her complaints do not even amount to tangible adverse employment actions, such as excluding her from a conversation or determining the composition of a particular committee. Opening Br. 58.

aware of her report to Chancellor Pagano, or show any connection between that communication and subsequent employment action. Just because Dr. Marshall complained, the law does not assume that every action, taken by anyone at any time following that complaint, was in retaliation for it.

Moreover, Dr. Marshall also fails to note the many positive employment actions taken after that date, including two raises, and her own admissions that she felt she was treated *better* after she complained. CP 2740-41. Dr. Marshall has wholly failed to meet her burden of showing any connection between her complaint to Chancellor Pagano and any subsequent adverse action.

Even when an employee shows a causal connection between her complaint and an adverse action, summary judgment is still appropriate unless she can demonstrate pretext or demonstrate retaliation was a substantial motivating factor. *Mackey*, 12 Wn. App. 2d at 572. Again, Dr. Marshall fails to even argue this aspect of her burden, and she cannot meet those

standards regardless. *See* Section IV.B.3 (explaining Dr. Marshall's poor teaching caused the adverse actions she challenges); CP 2722-23, 4798-99.

E. Dr. Marshall is not a whistleblower.

Dr. Marshall's whistleblowing claim was properly dismissed. She does not meet the statutory definition of a whistleblower, and even if she did, she cannot show retaliatory treatment.

The WLAD and RCW 42.40 prohibit retaliation against "whistleblowers" who have reported "improper governmental action to the auditor." RCW 42.40.020(10)(a); RCW 42.40.030; RCW 49.60.210(2). If a plaintiff meets her initial burden of demonstrating she qualifies as a "whistleblower" under RCW 42.40.020 and was subject to "workplace reprisal or retaliatory action" (RCW 42.40.050(1)(a)-(b)), the burden then shifts to the employer to show justifiable reasons for the challenged actions "and that improper motive was not a

substantial factor." RCW 42.40.050(2). Dr. Marshall cannot meet these standards.

Dr. Marshall does not qualify as a whistleblower.[12] Her alleged complaint to the state auditor on December 17, 2018 (which does not appear in the record) apparently related to ranking faculty members "extra-meritorious" in performance reviews, which Dr. Marshall claims had a discriminatory effect. Opening Br. 34-35. That report did not involve "improper governmental action" as RCW 42.40.020(6) and RCW 42.40.020(10)(a) require. Improper governmental action does *not* include personnel actions, including actions relating to "performance evaluations" or "claims of discriminatory treatment." RCW 42.40.020(6)(b). The auditor's office recognized Dr. Marshall's complaint as a personnel action, as it declined to investigate and instead noted the state commission responsible for investigating *employment* discrimination claims

[12] While Dr. Marshall misleadingly claims "[i]t's uncontested that she is a whistleblower," Opening Br. 56, Defendants have disputed this point since their first filing. CP 38, 53, 72-73.

would be better situated to address the alleged concerns. CP 394; RCW 49.60.120. Because Dr. Marshall's alleged concerns related to personnel actions that are explicitly excluded by statute, Dr. Marshall's whistleblowing claim was properly dismissed. RCW 42.40.020(6)(b), (10)(a).

Even if Dr. Marshall did qualify as a whistleblower, she still cannot show any retaliation. *See* RCW 42.40.050(2). Dr. Marshall admitted at her deposition that she did not tell anyone at the University about her complaint to the auditor. CP 2746. She now claims the University should have known about her "whistleblowing" because she submitted a tort claim that included a copy of the auditor's letter declining to investigate. Opening Br. 35. Dr. Marshall claims she provided a copy of her tort claim to attendees at a meeting (including Dr. Purdy and Dr. Young) in January 2019, but she still asserts no facts to show any University employee was aware she

complained to the auditor,[13] or took any resulting action against her. Opening Br. 35, 55-56. She certainly cannot show retaliation was a "substantial factor" under RCW 42.40.050(2) when she does not provide any evidence to show she was treated differently because of alleged whistleblowing activity, and instead describes being treated *better* after filing her tort claim. CP 2775-76. Summary judgment dismissal was proper.

F. The trial court properly dismissed aiding and abetting claims against individual defendants.

Because Dr. Marshall cannot prove her discrimination and retaliation claims, she cannot prove that Drs. Young, Purdy, or Pagano aided and abetted discrimination or retaliation. *E.g.*, *Hargrave v. Univ. of Wash.*, 113 F. Supp. 3d 1085, 1106 (W.D. Wash. 2015). The individual defendants emphatically deny

[13] The tort claim did not include a copy of her complaint to the auditor itself—just the auditor's letter declining to investigate—and the record does not show whether the copies of the tort claim Dr. Marshall passed out in January 2019 included the voluminous appendix where the auditor's response letter was buried. *See* CP 156-450. Even if it did, she still does not show anyone at the University was *aware* of this alleged complaint.

taking any action against Dr. Marshall based on her race, and Dr. Marshall has no evidence of racial motivation for any of their recommendations or actions. CP 2863, 3148, 3171. Claims against the individual defendants were properly dismissed.

G. Dr. Marshall failed to brief any issues beyond summary judgment.

Although Dr. Marshall's Notice of Appeal purports to challenge multiple trial court decisions, CP 5227-28, her brief only addresses summary judgment issues. By failing to assign error to, brief, or argue any other issues, Dr. Marshall has waived appellate review. *See* RAP 10.3(a)(6); *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2014). If Dr. Marshall attempts to raise any additional issues in her reply, the Court should decline to consider them. RAP 10.3(c); *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994).

V. REQUEST FOR ATTORNEYS' FEES AND COSTS

Defendants request allowable costs and attorneys' fees on appeal, and will file an expense affidavit if this relief is granted. RAP 18.1(b), (d); RCW 4.84.080.

VI. CONCLUSION

Summary judgment dismissal should be affirmed. Dr. Marshall failed to demonstrate substantial success in teaching consistent with the University's standards, and her poor teaching record drove the employment decisions she challenges. Dr. Marshall fails to raise a genuine issue of material fact that would suggest racial discrimination or retaliation is instead to blame. She also cannot show she experienced a racially hostile work environment or retaliation as a whistleblower. She should not be promoted and awarded tenure. The trial court properly dismissed her claims, and this Court should affirm.

RESPECTFULLY SUBMITTED this 6th day of September, 2022.

THIS BRIEF CONTAINS 11,983 WORDS.

HILLIS CLARK MARTIN & PETERSON P.S.

By 

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PROOF OF SERVICE

I, Erika M. Wilson, am a Legal Assistant for the law firm of Hillis Clark Martin & Peterson, P.S., 999 Third Avenue, Suite 4600, Seattle, Washington 98104. I hereby certify that on the date indicated below, I caused to be served via electronic service true and correct copies of ***Brief of Respondents*** upon the following:

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I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 6th day of September, 2022, at Lynnwood, Washington.

Erika M. Wilson
Erika M. Wilson, Legal Assistant

HILLIS CLARK MARTIN & PETERSON P.S.

September 06, 2022 - 4:46 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56547-1
Appellate Court Case Title:	Gillian Marshall, Appellant v. University of Washington, et al., Respondents
Superior Court Case Number:	19-2-11120-3

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